4/15/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chem-Met Services, Inc.,	)	**Docket No. RCRA-V-W-011-92**
	)	
Respondent	)	

ORDER GRANTING MOTION TO AMEND COMPLAINT

Allegations in the initial complaint and the factual background of this proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6928, were fully set forth in the Order Denying Motion To Dismiss And/Or For Accelerated Decision, dated February 23, 1993, and will be repeated here only insofar as necessary to understand Chem-Met's objections to the motion to amend the complaint.

Suffice it to say that the proposed amended complaint, for which leave to file was sought by motion, dated December 15, 1992, alleges, inter alia, that on August 22, 1990, Chem-Met received K086 waste from Tri-State Steel Drum Co., Inc.; that when Chem-Met processed the K086 waste, a new waste stream was created having more stringent land disposal restriction requirements (LDR) than the F006 waste, which was being processed prior to introduction of K086; that Chem-Met failed to follow its waste analysis plan by: 1) not notifying the land disposal facility that the waste stream had

changed and 2) failing to make qualification treatability tests on the new waste stream to determine if the applicable treatment standards were being met; that Chem-Met failed to test the K086 waste according to the frequency in its waste analysis plan as required by 40 CFR § 268.7(b); and that for seven shipments of K086 waste, Chem-Met failed to list the U.S. EPA Hazardous Waste Number and treatment standards on notices for the K086 shipments as required by 40 CFR § 268.7(b)(4). For these alleged violations, it was proposed to assess Chem-Met a penalty of $73,308. This is to be compared with the penalty of $1,122,733 proposed in the initial complaint.

After being granted requested extensions, Chem-Met served a response to the Motion For Leave To File An Amended Complaint on March 13, 1993. Chem-Met points out that section 22.14(d) of the Consolidated Rules of Practice, 40 CFR Part 22, does not specify any standards to be applied in determining whether to grant a motion for leave to amend and that, accordingly, the decision is left to the discretion of the ALJ (Response at 2). Because FRCP Rule 15(a) expressly provides that leave to amend "shall be freely given when justice so requires," Chem-Met argues that decisions construing Rule 15(a) cannot serve as appropriate guidance for addressing similar motions under the Consolidated Rules of practice (Response at 4).

Chem-Met points out that the complaint in this proceeding, filed on January 31, 1992, alleged violations of the LDR regulations and sought a penalty totaling $1,112,733, actually

$1,122,733. According to Chem-Met, it aggressively defended the action, fully researching the factual background of the alleged violations and filing the previously mentioned motion, which EPA has conceded was dispositive of virtually every alleged violation. Chem-Met says EPA allowed it to operate under the black cloud of the very large proposed penalty and to expend substantial resources in defending itself and then moved to file an amended complaint to include alleged violations which could have been included in the initial complaint. The proposed amended complaint did not include any of the violations initially alleged. Chem-Met asserts that nearly a year after proposing an exceedingly large fine, the Agency is essentially proposing to begin this litigation anew, which will require new discovery, preparation of a new answer and development of new defenses. It is contended that this action by EPA should not be condoned and that the motion for leave to file an amended complaint should be denied.

Because the initial complaint alleged that certifications by Chem-Met were improper, Chem-Met asserts the Agency knew that the certifications did not include K086 waste. Therefore, Chem-Met alleges that the Agency had sufficient information to include this alleged violation in the initial complaint and that Complainant is being disingenuous in claiming the amended complaint is based on information obtained in settlement negotiations (Response at 4). Moreover, Chem-Met points out that the initial complaint alleged that Chem-Met failed to test shipments to determine compliance with LDR and that, accordingly, the Agency should not now be allowed to

amend the complaint to allege Chem-Met failed to comply with its waste analysis plan. It argues that, even if EPA learned of possible additional causes of action at the time of settlement discussions (May 20, 1992), the Agency unduly delayed in filing its proposed amendment (Response at 5).

Chem-Met also argues that even if FRCP Rule 15(a) be considered to provide guidance, amendments under that rule will not be allowed if the court finds "undue delay, bad faith, dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment," quoting Foman v. Davis, 371 U.S. 178, 182 (1962) at 182.

D I S C U S S I O N

Although Chem-Met is correct that FRCP Rule 15(a) contains language not found in Consolidated Rule 22.14(d) (40 CFR Part 22) entitled "Amendment of the complaint," it is settled that decisions construing FRCP Rule 15(a) may be looked to for guidance in determining motions to amend complaints under the Consolidated Rules of Practice. In the Matter of J.V. Peters Company, Inc., RCRA Appeal No. 85-4 (CJO, May 9, 1986).[1/] See also Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No.

[1/] For subsequent proceedings involving the cited case, see J.V. Peters & Company, Inc., et al., RCRA Appeal No. 88-3 (CJO, August 7, 1990) and J.V. Peters & Company, Inc., et al. v. William K. Reilly, Adm'r., U.S. EPA, Case No. 1:90 CV2246, D.C.N.D. Ohio (Memorandum of Opinion, August 13, 1991) (unpublished).

91-1 (EAB, August 5, 1992), wherein the EAB stated that "[it] adheres to the generally accepted principle that 'administrative pleadings' are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted" (slip opinion at 41), citing Yaffe Iron & Metal Co., Inc. v. U.S. EPA, 774 F.2d 1008, 1012 (10th Cir. 1985). Additionally, the EAB has cited with approval decisions construing FRCP Rule 15(a) which hold that mere delay is seldom, if ever, a sufficient reason for denying an amendment, that prejudice to the opposing party is the crucial factor and that prejudice within the meaning of FRCP Rule 15(b) requires a showing of "serious disadvantage" (Id. at 42). Other decisions are in accord with the cited rule. See, e.g., In the Matter of San Antonio Shoe, Inc., EPCRA Docket No. VI-501-S (Order Granting Motion To Amend Complaint, etc., April 2, 1992) quoting Cuffy v. Getty Refining & Marketing Co., 648 F.Supp. 802, 806 (D.Del. 1986) "(I)t is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent, but such harm does not rise to the level of prejudice such as to warrant denying the motion to amend." See also In the Matter of Spang & Company, Inc., Docket Nos. EPCRA-III-037 & 048 (Order Granting Motion To Amend Complaint, April 9, 1992) (prejudice [sufficient to warrant denial of motion to amend] means more than mere inconvenience or added expense).

Deasy v. Hill, 833 F.2d 38, 43 (4th Cir. 1987), cited by Chem-Met, is distinguishable from the facts herein, because although the court held that both undue delay in moving to amend and prejudice to the opposing party were present, the motion to amend was filed immediately before trial. As the court pointed out, belated claims which change the nature of litigation are not favored. In accordance with this rule, amendments to pleadings which are offered on the eve of trial and which would substantially expand the scope of the trial or alter the nature of defenses have been rejected. See, e.g., In the Matter of Briggs & Stratton Corp., TSCA No.V-C-001-002-003 (Initial Decision, June 17, 1980) and Evans v. Syracuse City School District, 704 F.2d 44 (2nd Cir. 1983). Here, no trial date has been set and, because it does not appear that the harm or inconvenience suffered by Chem-Met due to the amendment is other than that contemplated by the rule that pleadings are easily amended, and Chem-Met will have ample time to prepare its defense, Chem-Met hasn't shown any sound reason for denying the motion for leave to amend. See, e.g., In The Matter of AZS Corporation, Docket No. TSCA-90-H-23 (Order Denying In Part Motion To Amend Complaint, March 18, 1993).

The motion for leave to amend will be granted.[2/]

[2/] Complainant's motion for leave to file a reply to Chem-Met's response to the motion for leave to amend is denied. Chem-Met's motion for a determination that it is a prevailing party within the meaning of the Equal Access To Justice Act (5 U.S.C. § 504) will be decided, if and when Chem-Met files an appropriate claim under the Act.

O R D E R

Complainant's motion for leave to amend the complaint is granted. In accordance with RCRA § 3008(b) and Supplemental Rule 22.37(e)(4), Chem-Met shall file its answer to the amended complaint within 30 days after service of this order.

Dated this 15th day of April 1993.

Spender T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION TO AMEND COMPLAINT**, dated April 15, 1993, in re: Chem-Met Services, Inc., Dkt. No. RCRA-V-W-011-92, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: April 16, 1993

ADDRESSEES:

Peter E. O'Rourke, Esq.
O'Rourke and Dohan, P.C.
200 First Federal Building
Detroit, MI 48226

Joseph M. Polito, Esq.
Paul Revere, III, Esq.
Honigman Miller Schwartz
and Cohn
2290 First National Building
Detroit, MI 48226

Lynette Lupia, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. V
77 West Jackson Boulevard
Chicago, IL 60604-3590

Ms. Michelle Winston
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard
Chicago, IL 60604-3590